STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals:
M.J. Cavanagh, P.J., E.T. Fitzgerald and P.M. Meter, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 127489

vs.

JOSEPH ERIC DROHAN,
Defendant-Appellant.

Lower Court No. 02-187490-FH
COA No. 249995

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

STUART J. DUNNINGS, III
President
PAAM

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training. and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

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Statement of the Question

I.

Any fact (other than prior conviction) that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. Judicial fact-finding at sentencing in Michigan goes only to establishing the minimum range for the indeterminate sentence, and does not permit enhancement of the maximum. Does a right to jury trial exist with regard to facts that go to the minimum range in an indeterminate sentence?

Amicus answers: "NO"

Statement of Facts

Amicus joins in the Statement of Facts of the appellee, the People of the State of Michigan, whom amicus supports.

Argument

I.

Any fact (other than prior conviction) that *increases the maximum penalty* for a crime must be submitted to a jury and proven beyond a reasonable doubt. Judicial fact-finding at sentencing in Michigan goes only to establishing the minimum range for the indeterminate sentence, and does not permit enhancement of the maximum. No right to jury trial thus exists with regard to facts that go to the minimum range in an indeterminate sentence.

A. Defining Terms

"The first step to wisdom is calling a thing by its right name."[1]

Critical to the inquiry here is a common terminology, for whether *Blakely v Washington*[2] affects Michigan's legislative sentence-guidelines scheme turns on whether that scheme differs in material respects from that condemned by the Supreme Court in *Blakely*. Defendant takes a different approach, his view being that the

> ...question to be determined is not one of determinate sentencing vs. indeterminate sentencing.... [T]he United States Supreme Court has made it clear that the Sixth Amendment guarantees that a defendant *cannot be sentenced* on the basis of information, other than his prior record, that has not been proven to his jury beyond a reasonable doubt.[3]

But this is demonstrably false; the United States Supreme Court has never said any such thing—indeed, it has said the opposite. Defendant thus proceeds on a false premise, assuming that

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[1] See among others, *Roulette v City of Seattle*, 78 F3d 1425, 1426 (CA 9, 1996).

[2] *Blakely v Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

[3] Appellant's Brief, at 16.

the maximum sentence in Michigan's sentence scheme is wholly irrelevant to the issue, when it is, as will be seen, outcome-determinative. And the amicus brief of the Criminal Defense Attorneys of Michigan argues that Michigan's guidelines scheme is "functionally" the same as the guidelines schemes involved in both *Blakely* and *Booker*,[4] also treating the maximum sentence that the sentencing judge is required by law to impose as both legally and factually irrelevant. It is neither. The foundation of the argument of the amicus is thus also fundamentally flawed.[5]

(1) Confusion On Terminology Demonstrated

That a lack of agreement on terminology can cause confusion is demonstrated by the State's petition for rehearing in *Blakely* itself. The State took issue with the Court's conclusion in *Apprendi* and *Blakely* that the historical evidence reveals that at the time of the framing of the Bill of Rights "statutes provid[ed] fixed-term sentences," the State pointing to several federal statutes from the period providing that on conviction the defendant "shall be imprisoned *not exceeding*" a certain period of years.[6] The State concluded that these statutes thus created indeterminate sentences of from 0 to the maximum allowed (for example, misprison of treason, providing for imprisonment not exceeding seven years, thus carried an "indeterminate sentence" of 0 to 84 months). But determinate

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[4] Amicus Brief, at 4.

[5] The fatal flaw in the argument of the amicus is somewhat subtle; the amicus proceeds on the principle that it is improper to "increase the punishment that offenders are subject to" based on facts other than prior convictions—but this is *not* the principle established in *Apprendi/Blakely/Booker*. The principle established there is that is in inappropriate to expand the *maximum* possible punishment based on facts, other than that of a prior conviction, not found by the jury. Whether a sentencing scheme is indeterminate is thus essential to the inquiry (and was important to the Supreme Court itself).

[6] See Rory K. Little and Teresa Chen, "The Lost History of Apprendi And The Petition For Rehearing," 17 Fed Sent R 69 (2004) (reproducing the petition for rehearing), pointing to 1 Stat. 97 (1789), and several other statutes (see footnote 4 of the petition).

and not indeterminate sentences were imposed under these statutes; the State confused *mandatory* sentences as opposed to *discretionary* sentences with *indeterminate* sentences, and to do so hopelessly confuses the analysis.

(2) An Indeterminate Sentence Has A Minimum and A Maximum

The State of Washington erred by treating statutes that do not impose a mandatory *fixed* term on conviction as indeterminate sentences. The sentence to be imposed under these early statutes was not mandatory (though most were at that time, as *Apprendi* points out), but there is no evidence that it was not to be a fixed—that is, determinate—term, selected from within the statutory range. The sentencing scheme in these situations is discretionary rather than mandatory, but the sentence imposed is not indeterminate, but determinate.

The common understanding of an indeterminate sentence is given in *Black's Law Dictionary:* a "... sentence of an unspecified duration, such as one for a term of 10 to 20 years."[7] Indeterminate sentencing—as opposed to a flat term—is a fairly recent invention. When theories of rehabilitation rather than punishment took over penology, "it was reasoned that the prisoner should be sentenced until he or she had reformed—which was by definition an indeterminate time."[8] Michigan was one of the first states to react legislatively, but at first only in a very limited fashion.[9] The idea quickly

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[7] *Black's Law Dictionary* (7th ed. 1999), p. 1367. And see also *Ballentine's Law Dictionary* (3rd ed. 1969), p. 610, defining an indeterminate sentence as one imposed "not for a precise period of time, but in terms of a minimum period and a maximum period of imprisonment as provided by statute for the criminal offense."

[8] Ilene Nagel, "Structuring Sentencing Discretion: the New Federal Sentencing Guidelines," 80 J. Crim. L. & Criminology 883, 893 -894 (1990).

[9] See Alan Dershowitz, "Indeterminate Confinement: Letting the Therapy Fit the Harm," U Pa L Rev 297, 314 (1974) (describing an indeterminate sentence scheme enacted in 1869 for "common prostitutes").

grew, so that in the 20-year period between 1880 and 1899 seven states enacted indeterminate sentencing legislation, and in the decade that followed twenty-one more states followed suit. Eventually, every state had some form of indeterminate sentencing.[10]

In Michigan, indeterminate sentencing was found early on to be unconstitutional under the state constitution.[11] The difficulty was cured by constitutional amendment (now Article IV, § 45 of the Michigan Constitution) to the effect that "the legislature may provide for indeterminate sentences as punishment for crime and for the detention of persons in prison or detained under such sentences." Almost all sentences now in Michigan are indeterminate by statute (there are some few exceptions, such as the flat two-year sentence for felony-firearm), the legislature providing that

> [W]hen a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.

This court soon held that the determination of the legislature that a definite term not be fixed was violated by a minimum and maximum with a barely discernible difference,[12] and mandated that the minimum be no more than 2/3 of the maximum, a principle now embodied in statute under the Michigan guidelines scheme.[13]

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[10] Nagel, supra, note 7.

[11] *People* v *Cummings*, 88 Mich 249 (1891).

[12] *People v. Tanner*, 387 Mich 683, 689-690 (1972).

[13] "The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." MCL § 769.34.

It remains the case—as in the present case—that the trial judge when sentencing a defendant to prison must impose an indeterminate sentence. The maximum of that sentence must be the statutory maximum (other than where the maximum is life in a sentence for life or any term of years, and then the trial judge must set the maximum as well), and the minimum sentence range is determined by application of the sentencing guidelines, which have absolutely no effect whatsoever on the maximum of the indeterminate sentence. The defendant's release at the expiration of the minimum term is the responsibility of the parole board. Many thousands of defendant's serve *past* the minimum sentence imposed by the trial judge. The trial judge has no authority to set a maximum greater than that provided by statute for violation of the offense, other than in cases of habitual offenders where by statute the maximums are enhanced by law.

In sum, then, amicus will use the following terminology here, terminology consistent with the discussions in *Apprendi/Blakely/Booker*:

- **Determinate sentence**. A determinate sentence is a *fixed* sentence for a flat term, with no minimum or maximum.
  - **Mandatory determinate sentence.** A mandatory determinate sentence is a sentence for a fixed term set by the legislature from which the sentencing judge may not deviate (e.g. "two years").
  - **Discretionary determinate sentence**. A discretionary determinate sentence is a determinate sentence imposed by the trial judge within a permissible range (e.g. "a term of years not exceeding seven years"; a guidelines range of "49-53 months"), but not to exceed that range without certain factual findings, often regarding facts concerning the commission of the offense.

- **Indeterminate sentence**. An indeterminate sentence is not for a fixed or precise term, but one imposed in terms of a minimum period and a maximum period.

  - **Mandatory-minimum indeterminate sentence**. A sentencing judge must impose an indeterminate sentence, but the minimum cannot be less than a certain term (e.g. "not less than two years").

  - **Guidelines-minimum indeterminate sentence**. A sentencing judge must impose an indeterminate sentence, and the range for the minimum is determined by application of sentencing-guidelines factors. The judge must establish a minimum within this range, and cannot depart (higher or lower) without certain factual findings, often regarding facts concerning the commission of the offense, but these findings in no way authorize any expansion of the statutory maximum in the indeterminate-sentencing scheme (save for the fact of a prior conviction in a habitual-offender scheme).

B. The Rationale of *Apprendi/Blakely/Booker* Is Limited to Increases in the Maximum in Either a Determinate or Indeterminate Sentencing Scheme, and Is Wholly Inapplicable To Determinations Of the Minimum Sentence Within the Statutory Maximum In An Indeterminate Sentencing Scheme

"'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in my life!' "

A determinate sentence has no "minimum"—it is for a set term. An indeterminate sentence has both a minimum and a maximum term set. Defendant and his amicus treat an indeterminate sentence minimum as though it were both the minimum and maximum, but, like Alice with the Cheshire Cat, amicus has never seen an indeterminate sentence without a maximum. Here, the issues raised on appeal are the scoring of various OV's. The *Blakely* claim is that "judicial factfinding" to determine the *minimum* range of an indeterminate sentence, statute setting the

maximum,[14] is unconstitutional. This is absolutely mistaken, and a misreading of the case. Defendant and his amicus studiously avoid language in the governing opinions that puts the lie to the claim "that defendant *cannot be sentenced* on the basis of information, other than his prior record, that has not been proven to his jury beyond a reasonable doubt." In truth, *Blakely* has no application whatsoever to determination of a minimum range of an indeterminate sentence, or even to departures from the minimum range, because under Michigan's sentencing-guidelines scheme a trial judge has *no* authority to enhance the statutory *maximum* based on anything other than a previous conviction. Because *Blakely* is built on *Apprendi v New Jersey*,[15] the discussion must begin with that case.

(1) The United States Supreme Court Cases

In *Apprendi* the Court considered a state statutory scheme where the offense in question, possession of a firearm for an unlawful purpose, was punishable with between five years and 10 years, so that the maximum statutory penalty was 10 years. But under a separate provision, known as the state's "hate crime" law, the sentence range was extended to 10 to 20 years–thereby enhancing the maximum possible incarceration from 10 years to 20 years, on a finding by a preponderance of the evidence by the trial judge at sentencing that in committing the crime the defendant acted with

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[14] MCL 769.8: "The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence." And even in those cases, such as this one, where the trial judge sets the maximum–that is, where imposing a term of years where the statute allows any term of years or life–whatever maximum set by the trial judge is not an "enhanced" maximum but within that set by the statute (life).

[15] *Apprendi v New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

a particular purpose; namely, to "intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

The United States Supreme Court phrased the question before it as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing *an increase in the maximum prison sentence* for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."[16] Observing that the answer to this question was "foreshadowed by our opinion in *Jones v. United States*..., construing a federal statute," where the Court had held that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that *increases the maximum penalty* for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt'" the Court concluded that "the Fourteenth Amendment commands the same answer in this case involving a state statute."[17] It is difficult to avoid, without some conscientious effort, the Court's emphasis on statutory schemes that increase the *maximum* time in prison authorized by statute on findings by the sentencing judge relating to some facts concerning the commission of the crime.

Critically, the Court distinguished determinations of a sentence that falls within the statutory range from sentences that elevate the maximum permitted by law:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion –taking into consideration various factors relating *both to offense* and offender– in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised

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[16] *Apprendi*, 530 US 466, at 469-469, 120 S Ct 2348, 2351.

[17] *Apprendi*, 530 US at 476, 120 S Ct at 2355.

> discretion of this nature in imposing sentence *within statutory limits* in the individual case (first emphasis supplied; second supplied by the Court)[18]

The holding, then, of *Apprendi* that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt,"[19] by its own terms, has nothing whatsoever to do with "imposing a judgment *within the range* prescribed by statute," where the trial judge is free to take "into consideration various factors relating *both to offense* and offender," and thus the state is free to create a statutory scheme including offense variables to establish that sentence within the range prescribed by statute, and to allow departures, based on judicial factfinding, so long as the statutorily set *maximum* is not exceed (save by a finding of recidivism). Does anything in *Blakely* extend *Apprendi* to indeterminate sentencing schemes, and the establishment of the minimum sentence within the range established by statute? The answer is no.

Blakely not only concerns a determinate sentencing scheme, it makes clear that indeterminate sentencing schemes are *not* within its rule nor that of *Apprendi*. The State of Washington has a determinate sentencing scheme, and parole does not exist; the defendant simply completes his sentence and is released without restriction. Blakely was convicted of kidnaping, which under state law was punishable by a term not to exceed 10 years. But the state sentencing scheme provided that the defendant be sentenced to a determinate term of between 49 to 53 months (a "discretionary determinate sentence," albeit with a narrow range of discretion). In other words, after the calculation of sentence guidelines the trial judge had to set a fixed, determinate sentence, and the maximum that

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[18]. *Apprendi,* 530 US at 481, 120 S Ct at 2358

[19] *Apprendi*, 530 US at 490, 120 S Ct at 2362-2363.

determinate term could be by law was 53 months, so that, *based on the conviction itself*, the most defendant could receive by statute was 53 months. He was not to be sentenced to 53 months to 10 years, with the decision on release after service of the minimum in the hands of the parole board; rather, his sentence was to a determinate term, the maximum of which was 53 months based solely on the conviction itself. The defendant pled guilty. The sentencing scheme in Washington, however, allowed a trial judge to impose a determinate term *above the maximum* of the standard range for the determinate term on a finding of "substantial and compelling reasons justifying an exceptional sentence," the statute giving an illustrative list of such aggravating factors, with those factors and any other aggravating factor employed by the judge required to be outside of those used in computing the standard range sentence for the offense. The trial judge, after ultimately conducting a lengthy hearing, found that Blakely had acted with "deliberate cruelty," and exceeded the top of the determinate sentence range by 37 months, giving Blakely a "flat" or determinate sentence of 90 months. Thus, Blakely's maximum sentence (not the minimum within the statutory range) was enhanced slightly more than 3 years by a determination by the trial judge at sentencing that the crime had been committed in a certain manner.

The Supreme Court held that for purposes of *Apprendi* the "statutory maximum" is "the *maximum* sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*... In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding *additional* facts, but the maximum he may impose *without* any additional findings."[20] That the Court meant what it said–that its holding applied to the *maximum* the judge may sentence the defendant to without additional factfinding, and not to a

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[20] *Blakely*, 124 S Ct at 2537 (emphasis supplied).

minimum set within the statutory maximum–was made clear in the Court's opinion. Justice O'Connor in dissent argued that "because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, *the constitutionality of the latter* [that is, *indeterminate* sentencing schemes] implies the constitutionality of the former." Justice Scalia for the Court replied that indeterminate sentencing does *not* suffer from the constitutional infirmities of determinate sentencing, where the *maximum* may be enhanced by judicial factfinding, because indeterminate sentencing

> increases judicial discretion, to be sure, *but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty*. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) *may implicitly rule on those facts he deems important to the exercise of his sentencing discretion*. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence–*and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned*. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence–and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury (emphasis supplied).[21]

Blakely, then, applies to determinate sentencing schemes where the statutory guidelines *require* a fixed sentence be imposed within a range, with the statutory scheme permitting the judge to enhance the *maximum* sentence based on judicial factfinding. Where the facts which enhance the statutory determinate maximum sentence determined under the guidelines must be found by the judge because

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[21] *Blakely,* 124 S Ct at 2541.

not admitted by the defendant at a plea or found necessarily by way of the verdict, the scheme is unconstitutional.[22]

Amicus has absolutely no quarrel with the principles established by the Supreme Court in its explication of the right to jury trial. Were it otherwise, the legislature could create a penal scheme providing that

> larceny is punishable by any term up to 1 year in prison. If at sentencing the trial judge determines by a preponderance of the evidence that the larceny was from the person or in the presence of the victim, the maximum term is 4 years; if the trial judge determines in the same manner that force was used in the taking, the maximum term is 10 years; if the trial judge determines in the same manner that a weapon was employed the maximum term is 20 years; if the trial judge determines in the same manner that acts of the defendant caused the death of the victim, the trial judge must sentence the defendant to life in prison without parole.

The crimes of felony-murder, robbery armed, robbery, and larceny from the person could all be simply "sentence enhancements" to the crime of larceny, with the defendant having no right to a jury determination, and to the standard of proof of beyond a reasonable doubt, on those facts that aggravate the *maximum* term possible. Amicus agrees that this is inconsistent with our understanding of the right to trial by jury.[23]

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[22] The dual majorities in *United States v Booker* and *United States v Fanfan* add nothing to this analysis, as the federal guidelines scheme is not distinguishable, said the Court, from that in the State of Washington, the judge being required to calculate guidelines and impose a determinate term within a determined range, exceeding the maximum of the range only for certain reasons, including some relating to facts concerning the manner of the commission of the crime.

[23] It is unnecessary to re-examine the source material mined in *Apprendi*; amicus would make not only to 1 Bishop *Criminal Law* (4th ed., 1868), § 729, p., 415: "it not uncommonly appears that the entire act of the defendant embraced a larger field of wickedness than is described in the indictment....When, therefore, the court pronounces sentence, if the law has give it a discretion, it looks at any evidence proper to influence a judicious magistrate to make the

(2) Post-*Blakely* Cases From Other Jurisdictions

That the reading of *Blakely* given by defendant and his amicus is aberrant is buttressed by the consistent holdings of other jurisdictions with regard to its application to indeterminate-sentencing schemes. A sampling makes the point.

- *Idaho—State v Stover*: "The *Blakely* Court recognized that an indeterminate sentencing system does not violate the Sixth Amendment:

> 'First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.'"[24]

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punishment heavier or lighter, yet so not as to exceed the limits prescribed for the offence as charged in the indictment, *and established by the verdict of the jury*." Amicus would also note one caveat. Though not involved in this case (and not the law), Justices Scalia and Thomas have suggested that the principle that the punishment authorized for the offense may be enlarged on a finding by the sentencing judge of prior convictions by the accused (under, of course, a statutory scheme so allowing)—a principle continued in *Apprendi*, *Blakely*, and *Booker*—is mistaken. They reach this conclusion by defining a "crime" as including "every fact that is by law a basis for imposing or increasing punishment." See concurring opinion of Justice Thomas, joined by Justice Scalia, in *Apprendi*, at 120 S Ct at 2368. Amicus believes this misses the mark; rather, added to this definition must be "every fact *concerning the act constituting the crime charged* that is by law a basis for imposing or increasing punishment." The *legal status* of the offender—that he is a felon at the time—while relevant to punishment has nothing to do with the commission of the offense charged. The situation is no different than the legal status of juvenile offenders; punishment is "enhanced" for adult offenders, but whether or not an individual has, by age, the legal status to be sentenced (and tried) as an adult, under the State's statutory scheme, is not a question passed upon by the jury but determined by the judge. But again, the question is not presented in this case.

[24] *State v. Stover,* 104 P.3d 969, 973 (Idaho,2005).

- *Hawaii—State v Rivera*: "the *Blakely* majority's declaration that indeterminate sentencing does not abrogate the jury's traditional factfinding function effectively excises indeterminate sentencing schemes such as Hawaii's from the decision's sixth amendment analysis."[25]

- *Pennsylvania—Commonwealth v Smith*: "Pennsylvania utilizes an indeterminate sentencing scheme with presumptive sentencing guidelines which limit the judge's discretion only concerning the minimum sentence....The United States Supreme Court has previously determined that this system does not violate the Sixth Amendment..."[26]

- *Massachusetts—Commonwealth v Junta*: "The recent United States Supreme Court decision in *Blakely v. Washington,* --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), has no application here, as the Massachusetts sentencing scheme provides for indeterminate sentences."[27]

C. Even if *Apprendi* and *Blakely* Applied to the Minimum Sentence in an Indeterminate Sentencing Scheme, Defendant's Position Fails Nonetheless

Apprendi and *Blakely* mean what they say; consequently, because the trial judge in Michigan does not and cannot enhance the maximum time the defendant may serve in prison beyond the maximum authorized by the legislature based on conviction for the offense charged, Michigan's sentence-guidelines scheme is unaffected by these decisions. But suppose, as defendant and his amicus claim, these decisions do not mean what they say, and in fact the principle enunciated applies to the calculation of the minimum sentence in an indeterminate sentence (even though whether defendant serves longer than this time is in the hands of the parole board, not the judge). Even taken

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[25] *State v. Rivera,* 102 P.3d 1044, 1055 (Hawaii,2004).

[26] *Commonwealth v. Smith* 863 A.2d 1172, 1178 -1179 (Pa.Super.,2004).

[27] *Commonwealth v Junta*, 815 N.E.2d 254, 262 (Mass.App.Ct.,2004).

on its own terms, the position of the defendant and his amicus fails because of a perhaps overlooked feature of the Michigan scheme.

As noted previously, after the adoption of virtually universal indeterminate sentencing in Michigan, this Court required that the minimum of an indeterminate sentence not exceed two-thirds of the maximum sentence set by law. *This principle has now been embodied in statute*; it is part of the guidelines regime, requiring that "[T]he court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."[28] Thus, the "maximum minimum" in the guidelines scheme is 2/3 of the statutory maximum. Application of the guidelines offense variables to reach the minimum range results in a minimum range that cannot exceed this legislatively set "maximum minimum." Even if a judge desires to depart from the minimum range reached under the guidelines, the judge may not, based on offense variables, or any other information, exceed 2/3 of the statutory maximum. Under the terms of *Blakely* and *Apprendi*, then, even if applied to the minimum, the Michigan guidelines scheme is perfectly appropriate, for the legislature has set a maximum for the minimum (2/3 of the statutory maximum), and the sentencing judge has *no* authority to enhance that maximum minimum based on facts concerning the commission of the offense, or anything else—it simply cannot be done.

D. Conclusion: *Apprendi* and *Blakely* Do No Affect Michigan's Statutory Scheme, Because the Trial Judge May Not, Based on Judicial Factfinding, Enhance the Statutory *Maximum* Penalty, But Only Determines the Minimum Sentence Within The Statutory Maximum

The assertion of defendant's amicus that Michigan's guidelines scheme is "functionally" the same as the guidelines schemes involved in both *Blakely* and *Booker*, as though the maximum

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[28] MCL § 769.34.

sentence in the scheme does not exist (and amicus means the *maximum*, not the *maximum-minimum*; that is, the top end of the guidelines range, which is not the maximum term a defendant can, and many do, spend in prison under the sentence) brings to mind Alice's statement "[C]ontrariwise, ... if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't."

The Michigan sentence-guidelines scheme is, of course, dramatically different than that of the State of Washington. The sentence imposed, when a prison sentence, must ordinarily be indeterminate, and the maximum is *not* determined by the sentencing judge (and thus cannot be exceeded by the judge by "judicial factfinding" as in the Washington scheme) but set by law.[29] In Michigan, the guidelines result only in a range within which the trial judge must set the minimum sentence–they do not permit the trial judge to exceed the maximum (other than in the case of a habitual offender, and *Apprendi/Blakely* specifically exclude the fact of a prior conviction from their holdings). Even a departure from the guidelines range in Michigan for substantial and compelling reasons does *not affect the maximum*, but only the minimum, and thus is wholly unaffected by the holding in *Blakely*. *And it is quite possible for the defendant in Michigan to serve beyond the minimum sentence set by the judge without being paroled.* In no way, then, can it be said that the trial judge, in setting the minimum, even by departing from the guidelines for substantial and compelling reasons, is setting the "statutory maximum" as in *Blakely*. *Blakely* has absolutely no application in Michigan. As Justice Stevens noted in *Apprendi*, in our system the "judge's role in

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[29] As to offenses carrying any term of years up to life, the trial judge does set the maximum, but it is never enhanced beyond the statutory maximum (life).

sentencing is constrained *at its outer limits* by the facts alleged in the indictment and found by the jury."[30] Nothing in the Michigan system runs afoul of this principle.

Blakely does not affect the Michigan sentencing scheme in any way. The guidelines here –and even departures from the guidelines for substantial and compelling reasons– never enhance the statutory maximum as in *Apprendi* or *Blakely*. The Michigan guidelines are unaffected by the Supreme Court decision.

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[30] *Apprendi*, at fn 10, 120 S Ct at 2359.

Relief

WHEREFORE, amicus requests that the Court of Appeals be reversed.

Respectfully submitted,

STUART J. DUNNINGS, III
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals